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No. 87-1245

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1987

TEXAS MONTHLY, INC.,

Appellant,

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

MOTION TO DISMISS OR AFFIRM

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NO. 87-1245

IN THE
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TEXAS MONTHLY, INC.,

Appellant,

vs.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas, JIM MATTOX, Attorney General of the State of Texas, and ANN RICHARDS, Treasurer of the State of Texas,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

MOTION TO DISMISS OR AFFIRM

Appellees, Bob Bullock, Comptroller of Public Accounts of the State of Texas, Jim Mattox, Attorney General of the State of Texas, and Ann Richards, Treasurer of the State of Texas, move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Appeals, on appeal pursuant to 28 U.S.C. Section 1257(2) on the grounds that the questions presented are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellant has appealed from a decision of a state court, the Court of Appeals, Third Supreme Judicial District, Austin, Texas, holding that Section 151.312 of the Texas Tax Code does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Free Press, Free Speech and Establishment Clauses of the First Amendment to the United States Constitution.

Section 151.312, Texas Tax Code, an exemption provision appearing in the Texas Sales and Use Tax Act, provides:

> Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith are exempted from the taxes imposed by this chapter.

There is no dispute that Appellant publishes a general interest magazine, *Texas Monthly*, on a monthly basis. Appellant paid taxes under protest pursuant to Section 112.051, Texas Tax Code, which permits a taxpayer to pay taxes to the agency charged with collecting them and then to sue to recover them. Appellant was not audited by Appellee Comptroller. The taxes in issue total $149,107.74 and were paid from February 20, 1985 through December 18, 1985. The amount represents tax due on Appellant's subscription sales of magazines.

Before October 2, 1984, subscription sales of magazines that were sold for a semiannual or longer period and were entered as second class mail were

exempt from the application of the Texas sales and use tax. Section 151.320, Texas Tax Code. Effective October 2, 1984, the exemption for these sales was repealed and they became subject to the sales and use tax. Sales of magazines from a newstand were subject to tax, both before and after October 2, 1984.

Effective October 1, 1987, the exemption for magazines appearing in Section 151.320 was re-enacted. Between October 2, 1984 and September 30, 1987, the only exemption for magazines, which were sold, appeared in Section 151.312, the religious periodical exemption. From October 2, 1984 through September 30, 1987 all sales of magazines were taxable under the Texas sales and use tax except for sales of religious periodicals.

The Texas sales and use tax was during the time period in issue imposed on all sellers of tangible personal property including magazine publishers. "A tax is imposed on each sale of a taxable item in this State." Texas Tax Code Section 151.051(a). "Taxable item" is defined as "tangible personal property." Texas Tax Code Section 151.010. "Tangible personal property" is "personal property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner." Texas Tax Code Section 151.009. Under Texas Tax Code Section 151.054(a), "All gross receipts of a seller are presumed to have been subject to the sales tax unless a properly completed resale or exemption certificate is accepted by the seller."

QUESTIONS PRESENTED

1. Whether a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that

consist wholly of writings promulgating the teaching of the faith" unconstitutionally discriminates in the taxation of periodicals based on content under this Court's decision in *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 1722 (1987).

2. Whether a state statute exempting from a general sales tax only those "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith" is invalid as violative of the Establishment Clause of the First Amendment.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

I. Section 151.312, Texas Tax Code, does not violate the Equal Protection Clause of the Fourteenth Amendment and the Free Press and Free Speech Clauses of the First Amendment. The Texas sales tax scheme does not unconstitutionally discriminate between periodicals based on content.

The Texas tax scheme does not offend the First and Fourteenth Amendments and does not conflict with recent decisions of this Court.

Arkansas Writers' Project Inc. v. Ragland, 107 S.Ct. 1722 (1987) and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), relied on by Appellant to support its argument of content based discrimination, deal with tax systems substantially different from the Texas system. In *Arkansas Writers' Project*, religious, professional, trade and sports journals and/or publications printed and published within the State and sold through regular

subscription were exempted from the Arkansas sales and use tax act. General interest publications were not exempt. *Arkansas Writers' Project,* a general interest publication, was one of only one or two Arkansas publications paying the tax. The court noted "the burden of the tax clearly falls on a limited group of publishers." 107 S.Ct. at 1727.

The *Minneapolis Star* tax scheme also does not resemble the Texas tax structure. Minnesota exempted the sale of newspapers and other publications but imposed a special use tax on the cost of paper and ink products consumed in the production of a publication. The first $100,000 of such purchases was exempted. The effect of this statute was that in 1974 and 1975, 11 publishers and 13 publishers, respectively, paid the tax. The *Star Tribune* was one of the 11 and 13 publishers paying the tax. In both years, the *Star Tribune* paid two-thirds of the total revenue raised by the tax. This Court determined that by creating the special use tax Minnesota had singled out the press for special treatment and had violated the Free Press Clause of the First Amendment. The tax was being paid only by the press and only by a small group of the press. "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers." 460 U.S. at 591. This tax scheme does not resemble the Texas tax structure.

Unlike *Arkansas Writers' Project* where a very small group of magazines were singled out for taxation, and *Minneapolis Star* where the tax was being paid only by the press and only by a small group of the press, the Texas system subjects all publishers to tax, except publishers of religious publications.

For content discrimination to apply to a tax provision, the press must be singled out or a small group of the press must be targeted. There is no selective content based exemption or taxation of certain magazines by taxing all types of magazines and exempting one type.

Appellant should pay the same tax that all other sellers of tangible personal property must pay to Texas. "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). See also *Arcara v. Cloud Books Inc.*, 106 S.Ct. 3172, 3177 (1986).

Texas does not have to prove its statutory provision is necessary to serve a "compelling state interest" and that it "is narrowly drawn to achieve that end." *Arcara v. Cloud Books* Inc., 106 S.Ct. at 3177 and 3178. The statute in question is an exemption provision. The Court of Appeals correctly placed the burden on Appellant of negating every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Legitimate state purposes supporting the provision are to prevent an excessive entanglement with religion and/or to reinforce the desired separation of church and state. Appellant does not seek to have this Court review the case on a rational basis standard.

Appellees do not understand how Appellant would be benefited by this Court assuming jurisdiction. Appellant attacks the exemption and not the tax. Unlike *Minneapolis Star*, where the Court invalidated the use tax and the taxpayer recovered the tax, or *Arkansas Writers Project* where the Court also invalidated the whole tax and the taxpayer recovered the

tax, the only issue to be addressed in this case is the validity of the exemption in Texas Tax Code Section 151.312. If Section 151.312 were invalidated, this Section would fall. There is no basis for invalidating the tax because the tax is a non-discriminatory tax on all magazine sellers. The result of Appellant's argument would be that religious periodicals would become subject to taxation. Appellant would still be responsible for the tax it paid to the State of Texas and could not recover the amount it paid under protest. Appellant has presented no substantial federal question and the Supreme Court should not take jurisdiction of the appeal to review the State Court's judgment.

II. The exemption from tax for religious periodicals does not constitute a law "respecting an establishment of religion."

Section 151.312, Texas Tax Code, meets the three part test, established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) to determine whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion."

The secular legislative purpose of a tax exemption was described in *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970) as "neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." The state court found the purpose of Section 151.312 was to "restrict the fiscal relationship between church and state, and tends to compliment and rein-

force the desired separation insulating each from the other." 731 S.W.2d 160, 163 (Tex. App.-- Austin 1987, writ ref'd n.r.e.).

Appellees do not remember asserting at the state court level, as alleged by Appellant, that the secular legislative purpose of Section 151.312 was to prevent an excessive entanglement with religion. Appellees did raise that with regard to the equal protection attack the legitimate state purpose for the provision was to help avoid a violation of the Establishment Clause by preventing the State from becoming excessively entangled with religion.

The secular purpose ("neutrality test") requirement is aimed at preventing the government from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints et al v. Christine Amos,* 107 S.Ct. 2862, 2868 (1987). The purpose of Section 151.312 is neutrality toward religion publications.

The exemption does not have the primary effect of advancing or inhibiting religion ("effects test"). It creates under *Walz* only a "minimal and remote involvement between church and State and far less than taxation of churches." 397 U.S. at 677. In *Walz* this Court held *"There is no genuine nexus between tax exemption and establishment of religion."* 397 U.S. at 677 (emphasis supplied).

The exemption does not single out religion to receive a benefit not available to other charitable causes. Under the Texas sales and use tax statute an organization created for educational or charitable purposes is exempt on its purchases provided no part

of the net earnings of the organization benefits a private shareholder or individual and the items purchased are related to the purpose of the organization. Texas Tax Code Section 151.310(a)(l), p. App. 1, *infra*. Section 151.312 exempts both the sale and purchase of religious periodicals. Section 151.310 exempts only a purchase of tangible personal property but covers the purchase of a publication printed for and related to the advancement of the organization. Section 151.310(c), Texas Tax Code, permits a one day tax free sale or auction once a year by an educational or religious organization. The sale encompasses any type of tangible personal property including magazines or other publications printed for and related to the advancement of the organization. Charitable and educational organizations are given similar benefits under the Texas sales and use tax act to those accorded to religious organizations.

The fact religion may receive a benefit not available to other charitable causes does not mean Section 151.312 is advancing religion. As noted in *Walz* supplying of costly teaching materials is not a legislative aid to religion. 397 U.S. at 673. *See Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 248 (1968). Why then should an exemption for sales of religious periodicals be classified as such? After a determination is made, if any, regarding the entitlement to the exemption, there is no further involvement between the State and the church. The government may accommodate religious practices without violating the Establishment Clause. *Hobbie v. Unemployment Appeals Commission of Florida et al*, 107 S.Ct. 1046, 1051 (1987). The testimony indicates the agency administering the tax, Appellee Comptroller of Public Accounts, interprets Section 151.312 in such a manner that the parties to the sale transaction make

the decision on whether the sale is exempt under Section 151.312.

A law is not unconstitutional simply because it allows churches to advance religion. "But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster: for example, the property tax exemption at issue in *Walz v. Tax Comm'n, supra*, or the loan of school books to school children." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints et al v. Christine Amos.* 107 S.Ct. at 2868.

Section 151.312 does not create an excessive entanglement with religion. Appellant argues the exemption requires the State to determine (1) whether the publisher or distributor is a "religious faith" and (2) whether the contents of the publication consist "wholly of writings promulgating the teaching of the faith." Even if the State must make these decisions, the grant of the exemption leads to lesser involvement with religion by the State than does taxation. If a seller of publications qualifying for exemption under Section 151.312 became delinquent in the collection and payment of tax on such sales, Appellee Comptroller of Public Accounts would under his normal collection process file tax liens against the property of the seller under the authority of Texas Tax Code Section 113.002, p. App. 3, *infra*, issue notices to freeze money in bank accounts under Texas Tax Code Section 111.021, p. App. 4, *infra*, and if property were owned by the seller, could by extra judicial procedures seize and sell the property to satisfy the tax debt pursuant to Texas Tax Code Section 111.017, p. App. 6, *infra*, Government's involvement with religion would be greatly expanded, if the exemption were not present. The making of a mere decision whether a publication

qualifies for exemption does not create the great degree of involvement with religion that the elimination of the exemption would cause.

Due to its passive nature, Section 151.312 does not create an ongoing partnership between the State and religion presented by direct aid. Once the sale of the publication is determined to be exempt there is no further action needed by the state or religion. The exemption has been applied in such a manner that "official and continuing surveillance" by the government is avoided. The administration of Section 151.312 prevents practically any State involvement.

Although the agency construction of Section 151.312 does not appear in its rule (34 Tex. Admin. Code Section 3.299(d)), State law is that an agency's interpretation of its own rule is to be considered part of the rule. *Texarkana and Ft. S. Ry. Co. et al v. Houston Gas & Fuel Co.*, 121 Tex. 594, 51 S.W.2d 284, 287 (1932); *Lawyers Title Ins. Corporation v. Board of Ins. Com'rs et al*, 207 S.W.2d 972, 976 (Tex. Civ.App.-- Austin 1948, writ ref'd n.r.e.). The State court was properly entitled to rely on the agency construction regarding Section 151.312.

Appellant also asserts that Appellee Comptroller's construction of Section 151.312 is not binding under Texas law. Under Texas law when a statute is ambiguous, the agency construction of the statute should be followed. *Federal Crude Oil Co. v. Yount Lee Oil Co.*, 122 Tex. 21, 52 S.W.2d 56, 62 (Tex. 1932), *Lumbermen's Underwriters v. State Board of Insurance*, 502 S.W.2d 217, 220 (Tex. Civ. App.-- Austin 1973, writ ref'd n.r.e.); and *Davis Kemp Tool Co. Inc. v. Bullock*, 584 S.W.2d 579 (Tex. Civ. App.-- Beaumont, writ ref'd n.r.e.) per curiam, 590 S.W.2d 708 (Tex.

1979). The provisions of Section 151.312 are ambiguous. What is a book consisting wholly of writings sacred to a religion or religious faith? In recognition of this ambiguity, Appellee Comptroller has not attempted to decide what publications qualify under Section 151.312. Appellee's construction should be accepted under existing state law. It is a reasonable construction of the exemption and one that does not involve an excessive entanglement with religion.

Even disregarding Appellee's construction, Section 151.312 is constitutional. It has a valid secular purpose, it neither advances nor inhibits religion and does not foster an excessive entanglement with religion.

CONCLUSION

Appellees respectfully submit that the Questions upon which this appeal is based are so unsubstantial as not to need further argument and Appellees respectfully move the court to dismiss the appeal, or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeals, Third Supreme Judicial District, Austin, Texas.

Respectfully submitted,

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APPENDIX A

Section 151.310

151.310. Religious, Educational, and Public Service Organizations

(a) A taxable item sold, leased, or rented to, or stored, used, or consumed by, any of the following organizations is exempted from the taxes imposed by this chapter:

(1) an organization created for religious, educational, or charitable purposes if no part of the net earnings of the organization benefits a private share holder or individual and the items purchased are related to the purpose of the organization;

(2) an organization qualifying for an exemption from federal income taxes under Section 501(c)(3), (4), (8), (10), or (19), Internal Revenue Code, of the item sold, leased, rented, stored, used, or consumed relates to the purpose of the exempted organization and the item is not used for the personal benefit of a private stockholder or individual;

(3) a nonprofit organization engaged exclusively in providing athletic competition among persons under 19 years old if no financial benefit goes to an individual or shareholder;

(4) a company, department, or association organized for the purpose of answering fire alarms and extinguishing fires or for the purpose of answering fire alarms, extinguishing

fires, and providing emergency medical services, the members of which receive no compensation or only nominal compensation for their services rendered, if the taxable item is used exclusively by the company, department, or association; or

(5) a chamber of commerce or a convention and tourist promotional agency representing at least one Texas city or county if the chamber of commerce or the agency is not organized for profit and no part of its net earnings inures to a private shareholder or other individual.

(b) The sale of, or contracting for the sale of, concessions at an event conducted by an organization exempted under Subsection (a)(3) of this section does not prevent the application of the exemption to that organization.

(c) An organization that qualifies for an exemption under Subsection (a)(l) of this section may hold one tax-free sale or auction during a calendar year and the tax-free sale or auction may continue for one day only. The sale of a taxable item by a qualified organization at a tax-free sale or auction is exempted from the sales tax imposed by Subchapter C of this chapter. The storage, use, or consumption of a taxable item acquired from a qualified organization at a tax-free sale or auction is exempted from the use tax imposed by Subchapter D of this chapter until the item is resold or subsequently transferred.

(d) If two or more organizations jointly hold a tax-free sale or auction, neither organization may hold another tax- free sale or auction during the calendar year. The employment of and payment of a reasonable fee to an auctioneer to conduct a tax-free

auction does not disqualify an otherwise qualified organization from receiving the exemption provided by Subsection (c) of this section.

APPENDIX B

Section 113.002

113.002. Tax Lien Notice

(a) The comptroller shall issue and file a tax lien notice required by this chapter.

(b) A tax lien notice must include the following information:

(1) the name and address of the taxpayer;

(2) the type of tax that is owing;

(3) each period for which the tax is claimed to be delinquent; and

(4) the amount of tax only due for each period, excluding the amount of any penalty, interest, or other charge.

(c) A tax lien notice may include other relevant information that the comptroller considers proper.

APPENDIX C

Section 111.021

111.021. Notice to Holders of and Levy Upon Assets Belonging to Delinquent

(a) If a person is delinquent in the payment of an amount required to be paid or has not paid an amount claimed in a determination made against the person, the comptroller may notify personally or by registered mail any other person who:

(1) possesses or controls a credit, bank or savings account, deposit, or other intangible or personal property belonging to the delinquent or the person against whom the unpaid determination is made, hereafter referred to as "assets"; or

(2) owes a debt to the delinquent or person against whom the unpaid determination is made.

(b) A notice under this section to a state officer, department, or agency must be given before the officer, department, or agency presents to the comptroller the claim of the delinquent or person to whom the unpaid determination applies.

(c) A notice under this section may be given at any time within three years after the payment becomes delinquent or within three years after the last recording of a lien filed under this title, but not thereafter. The notice must state the amount of taxes, penalties and interest due and owing, and an additional amount of interest that will accrue by operation of law in a period not to exceed 30 days and,

in the case of a credit, bank or savings account or deposit, is effective only up to that amount.

(d) On receipt of a notice given under this section, the person receiving the notice:

(1) within 20 days after receiving the notice shall advise the comptroller of each such asset belonging to the delinquent or person to whom an unpaid determination applies that is possessed or controlled by the person receiving the notice and of each debt owed by the person receiving the notice to the delinquent person or person to whom an unpaid determination applies; and

(2) may not transfer or dispose of the asset or debt possessed, controlled, or owed by the person at the time the person received the notice for a period of 60 days after receipt of the notice, unless the comptroller consents to an earlier disposal.

(e) A notice under this section that attempts to prohibit the transfer or disposal of an asset possessed or controlled by a bank is not effective unless it is delivered or mailed to the principal office of the bank or the office of the bank at which the deposit is carried or the credit or property is held.

(f) A person who has received a notice under this section and who violates Subdivision (2) of Subsection (d) of this section is liable to the state for the amount of indebtedness of the person with respect to whose obligation the notice was given to the extent of the value of the asset or debt transferred or disposed of.

(g) At any time during the last 45 days of the 60-day period as stated in Subdivision (2) of Subsection (d) of this section, the comptroller may levy upon the asset or debt. The levy shall be accomplished by delivery of a notice of levy, upon receipt of which the person possessing the asset or debt shall transfer the asset to the comptroller or pay to the comptroller the amount owed to the delinquent or to the person against whom the unpaid determination is made.

(h) A notice delivered under this section is effective at the time of delivery against all property, rights to property, credits, and/or debts involving the delinquent taxpayer which are not at the time of such notice subject to an attachment, garnishment, or execution issued through a judicial process.

(i) Any person acting in accordance with the terms of the notice of freeze or levy issued by the comptroller is discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property, credits, and/or debts of the taxpayer affected by compliance with the notice of freeze or levy.

APPENDIX D

Section 111.017.

111.017. Seizure and Sale of Property

Before the expiration of three years after a person becomes delinquent in the payment of any amount under this title, the comptroller may seize and sell at public auction real and personal property of the person. A seizure made to collect the tax is limited only to property of the person that is not exempt from execution.